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15 Attorneys for Plaintiff

16 UNITED STATES DISTRICT COURT

17 FOR THE NORTHER DISTRICT OF CALIFORNIA

18 MYRICK TANTIADO, an individual,

19 Plaintiff,

20 vs.

21 POWER MEDICAL INTERVENTIONS, a
22 Pennsylvania corporation, and DOES ONE
23 through FIFTY, inclusive,

24 Defendants.

Case No. C 07-02874 CRB MED

DECLARATION OF STEPHEN F.
HENRY IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
MOTION FOR SUMMARY
ADJUDICATION

Original filing date: April 6, 2007

Removal date: June 1, 2007

25 I, Stephen Henry, declare:

26 1. I am attorney for plaintiff in the above entitled matter. I have personal knowledge
27 of the facts in this Declaration and if called upon to testify, I could and would testify competently
28 to the facts herein.

2. Attached to this Declaration as Exhibit A is a true and correct copy of Defendant
Power Medical Intervention's Supplemental Answers to Plaintiff's First Set Of Interrogatories
received from Defendant.

3. Attached to this Declaration as Exhibit B is a true and correct copy of excerpts of the Deposition of Myrick Tantiado.

I declare under penalty of perjury under the laws of California and the United States that the foregoing is true and correct. Executed in Berkeley, California on August 15, 2008

STEPHEN F. HENRY

EXHIBIT A

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Attorneys for Defendant Power Medical Interventions

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MYRICK TANTIADO, an individual,

Plaintiff,

vs.

POWER MEDICAL INTERVENTIONS, a
Pennsylvania corporation, and DOES ONE
through FIFTY, inclusive,

Defendants.

Case No. C 07-02874 EDL

**DEFENDANT POWER MEDICAL
INTERVENTION'S SUPPLEMENTAL
ANSWERS TO PLAINTIFF'S FIRST
SET OF INTERROGATORIES**

Defendant Power Medical Interventions, Inc. ("PMI"), by and through its attorneys,
hereby supplements its responses to Plaintiff's First Set of Interrogatories (the "Interrogatories")
as follows:

PRELIMINARY STATEMENT

1
2 1. These answers are made solely for the purposes of this action. Each answer is
3 subject to all objections as to competence, relevance, materiality, propriety and admissibility, as
4 well as to any and all other objections on any grounds that would require the exclusion of any
5 answer or any portion thereof if any of said answer were offered in evidence, all of which
6 objections and grounds are hereby expressly reserved and may be interposed at the time of any
7 deposition or at or before any hearing or trial in this matter.
8

9 2. The following answers are based on information presently available to and
10 located by PMI and its attorneys and, except for explicit facts expressly set forth herein, no
11 incidental or implied admissions are intended hereby. The fact that PMI answers or objects to
12 any Interrogatory or part thereof is not intended and shall not be construed as an admission that
13 PMI accepts or admits the existence of any facts set forth in or assumed by such Interrogatory, or
14 that such response or objection constitutes admissible evidence. The fact that PMI answers all,
15 or part, of any Interrogatory is not intended and shall not be construed as a waiver by PMI of all,
16 or any part, of any objection to any Interrogatory made herein.
17

18 3. PMI has not completed its investigation of this action, has not completed its
19 discovery or trial preparation, and may discover additional facts and/or documents responsive to
20 the Interrogatories in the future. These answers hereinafter are based on PMI's knowledge,
21 information and belief at this time, and are made without prejudice to the following objections,
22 and are based on PMI's diligent search of those records that it has located and that it reasonably
23 believes would contain the information sought. Nevertheless, some of the information sought by
24 Plaintiff's Interrogatories are not routinely compiled by PMI, and are not readily accessible to
25 any agent or employee of PMI. Furthermore, these answers were prepared based on PMI's good
26 faith interpretations and understanding of the Interrogatories and are subject to correction for
27

1 inadvertent errors or omissions, if any. PMI reserves the right to refer to, to conduct discovery
2 with reference to or to offer into evidence at the time of trial, any and all facts, evidence,
3 documents and things developed during the course of discovery and trial preparation,
4 notwithstanding the reference to facts, evidence, documents and things in these answers. PMI
5 assumes no obligation to voluntarily supplement or amend these answers to reflect information,
6 evidence, documents or things discovered following service of these answers. Nevertheless,
7 PMI specifically reserves the right to amend and/or supplement these answers at any time.
8

9 4. To the extent the Interrogatories purport to seek information which is protected by
10 the attorney-client privilege and/or the attorney work-product privilege or doctrine, PMI will not
11 provide any such information and will assume that the Interrogatories apply only to that
12 information falling outside the scope of the attorney-client privilege and the attorney work-
13 product privilege or doctrine. Inadvertent disclosure of any such privileged information shall not
14 constitute a waiver of any privilege or ground for objecting to disclosing such information and
15 shall not waive PMI's right to object to the use of such information.
16

17 **GENERAL OBJECTIONS**

18 1. PMI objects to each and every Interrogatory to the extent that it purports to
19 impose upon PMI obligations in excess of those set forth in the Federal Rules of Civil Procedure.

20 2. PMI objects to each and every Interrogatory to the extent that it seeks information
21 subject to the attorney-client privilege, the work product doctrine, or any other privilege or
22 protection, or information otherwise not discoverable within the meaning of the Federal Rules of
23 Civil Procedure.
24

25 3. PMI objects to each and every Interrogatory to the extent that the discovery
26 sought by any such Interrogatory is unreasonably cumulative or duplicative, or is obtainable
27 from some other source that is more convenient, less burdensome, or less expensive, and to the
28

1 extent compliance with any such request would be unduly burdensome, expensive, annoying and
2 oppressive, as prohibited by Rule 26(b) of the Federal Rules of Civil Procedure.

3 4. PMI objects to each and every Interrogatory that is not time limited as overly
4 broad.

5 7. PMI objects to each and every Interrogatory to the extent that it seeks confidential
6 or proprietary information, including business information and/or business trade secrets, whether
7 concerning itself or a third party, or concerning confidential personal information about
8 individuals, including PMI's employees.
9

10 **SPECIFIC OBJECTIONS AND RESPONSES**

11 PMI's specific objections and responses are subject to and without waiver of the
12 foregoing general objections. PMI reserves the right to revise, supplement, or clarify any of the
13 answers set forth below.
14

15 **INTERROGATORY NO. 1:**

16 For each denial, contained in your Answer to Plaintiff's Complaint, of factual allegations
17 asserted in Plaintiff's Complaint, please state the factual basis for that denial.

18 **ANSWER:**

19 PMI objects to this interrogatory because it seeks information subject to the attorney-
20 client privilege and the work product doctrine. PMI also objects to this interrogatory because it
21 seeks legal conclusions. PMI further objects to this interrogatory insofar as it seeks confidential
22 information. Subject to and without waiving the above general and specific objections, PMI
23 refers Plaintiff to its answers to the remaining interrogatories, the documents PMI will produce
24 in response to Plaintiff's Document Requests, and PMI's disclosures.

25 **INTERROGATORY NO. 2:**

26 For each Affirmative Defense contained in your Answer to Plaintiff's Complaint, state
27 the factual and legal bases for that Affirmative Defense.

ANSWER:

PMI objects to this interrogatory because it seeks information subject to the attorney-client privilege and the work product doctrine. PMI also objects to this interrogatory because it seeks legal conclusions. PMI further objects to this interrogatory insofar as it seeks confidential information. Subject to and without waving the above general and specific objections, PMI states:

- First Defense: Myrick Tantiado was an at-will employee who could be terminated for any reason or no reason at all. Nevertheless, Myrick Tantiado's employment with PMI was terminated for poor performance. Moreover, PMI paid Myrick Tantiado everything he was owed under the applicable commission policy, PMI's expense reimbursement policy, and PMI's vacation policy.
- Second Defense: On information and belief, Myrick Tantiado was either nonresponsive or an obstacle to the return of the products for which the sales commission offset is the basis of his claim for unreimbursed expenses.
- Third Defense: Myrick Tantiado was an at-will employee who could be terminated for any reason or no reason at all.
- Fifth Defense: Myrick Tantiado did not fulfill the expectations of his position while an employee of PMI.

INTERROGATORY NO. 3:

Identify all reasons for the termination of Myrick Tantiado by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waving the above general and specific objections, PMI states that Myrick Tantiado's employment with PMI terminated because of his poor job performance.

INTERROGATORY NO. 4:

Identify each person who participated in making the decision to terminate Myrick Tantiado from employment by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that John Roache, PMI's Vice President of Sales at the time and who is no longer employed by PMI, made the decision to terminate Myrick Tantiado's employment with PMI.

INTERROGATORY NO. 5:

Identify each document relied upon, considered or referred to in making the decision to terminate Myrick Tantiado.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. PMI further objects to this interrogatory to the extent that it seeks information subject to the attorney-client privilege or the work product doctrine. Subject to and without waiving the above general and specific objections, PMI states that it will produce non-privileged documents in response to Document Request No. 4 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 6:

Identify each complaint received at any time by Defendant from any person or entity regarding the performance of the SurgAssist Computer Powered Stapling System.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce non-

1 privileged documents containing, describing, or communicating a complaint received by PMI
2 regarding the performance of the SurgAssist Computer Powered Stapling System created or
3 received by PMI since January 1, 2004 upon entry by the Court of an appropriate Confidentiality
4 Agreement and Protective Order in response to Document Request No. 5 from which
5 information responsive to this interrogatory may be obtained.

6 **INTERROGATORY NO. 7:**

7 Identify and describe each complaint received at any time by Defendant from any person
8 or entity regarding the performance of the Circular Stapling Unit, 25mm (CS25).

9 **ANSWER:**

10 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
11 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
12 without waiving the above general and specific objections, PMI states that it will produce non-
13 privileged documents containing, describing, or communicating a complaint received by PMI
14 regarding the performance of the Circular Stapling Unit 25mm (CS25) created or received by
15 PMI since January 1, 2004 in response to Document Request No. 6 from which information
16 responsive to this interrogatory may be obtained upon entry by the Court of an appropriate
17 Confidentiality Agreement and Protective Order.

18 **INTERROGATORY NO. 8:**

19 Identify and describe each complaint received at any time by Defendant from any person
20 or entity regarding the performance of the Circular Stapling Unit, 29mm (CS29).

21 **ANSWER:**

22 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
23 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
24 without waiving the above general and specific objections, PMI states that it will produce non-
25 privileged documents containing, describing, or communicating a complaint received by PMI
26 regarding the performance of the Circular Stapling Unit 29mm (CS29) created or received by
27 PMI since January 1, 2004 in response to Document Request No. 7 from which information

responsive to this interrogatory may be obtained upon entry by the Court of an appropriate Confidentiality Agreement and Protective Order.

INTERROGATORY NO. 9:

Identify and describe each action of any kind and at any time taken by the United States Food and Drug Administration regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling Unit, 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29).

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce non-privileged documents created or received by PMI since January 1, 2004 in response to Document Request No. 8 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 10:

Identify and describe each communication of any kind and at any time from the United States Food and Drug Administration regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling Unit, 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29).

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce non-privileged documents created or received by PMI since January 1, 2004 in response to Document Request No. 9 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 11:

Identify and describe each communication of any kind and at any time to the United States Food and Drug Administration regarding the SurgAssist Computer Powered Stapling

1 System, the Circular Stapling Unit, 25mm (CS25) and/or the Circular Stapling Unit, 29mm
2 (CS29).

3 **ANSWER:**

4 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
5 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
6 without waiving the above general and specific objections, PMI states that it will produce non-
7 privileged documents created or received by PMI since January 1, 2004 in response to Document
8 Request No. 10 from which information responsive to this interrogatory may be obtained.

9 **INTERROGATORY NO. 12:**

10 Identify and describe each communication of any kind and at any time from any medical
11 doctor regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling Unit,
12 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29).

13 **ANSWER:**

14 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
15 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
16 without waiving the above general and specific objections, PMI states that it will produce non-
17 privileged documents containing, describing, or communicating a complaint from any medical
18 doctor regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling Unit,
19 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29) created or received by PMI since
20 January 1, 2004, if any, upon entry by the Court of an appropriate Confidentiality Agreement and
21 Protective Order in response to Document Request No. 11 from which information responsive to
22 this interrogatory may be obtained.

23 **INTERROGATORY NO. 13:**

24 Identify and describe each communication of any kind and at any time by Myrick
25 Tantiado regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling
26 Unit, 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29).

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce non-privileged documents containing, describing or communicating a complaint by Myrick Tantiado regarding the SurgAssist Computer Powered Stapling System, the Circular Stapling Unit, 25mm (CS25) and/or the Circular Stapling Unit, 29mm (CS29), if any, upon entry by the Court of an appropriate Confidentiality Agreement and Protective Order in response to Document Request No. 12 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 14:

Please state how many vacation days Myrick Tantiado accrued each year while working for Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that under the terms of PMI's vacation policy Myrick Tantiado accrued 10 vacation days per year at a rate of 0.833 days per month.

INTERROGATORY NO. 15:

Please state how many vacation days Myrick Tantiado used each year while working for Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that Myrick Tantiado did not use any vacation days in 2006.

1 **INTERROGATORY NO. 16:**

2 Please state how many accrued and unused vacation days Myrick Tantiado had at the
3 time of his termination by Defendant.

4 **ANSWER:**

5 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
6 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
7 without waiving the above general and specific objections, PMI states that under the terms of
8 PMI's vacation policy Myrick Tantiado had 5 days of accrued and unused vacation days at the
9 time his employment with PMI terminated.

10 **INTERROGATORY NO. 17:**

11 Please state whether Myrick Tantiado was paid for all of his accrued and unused vacation
12 days at the time of his termination by Defendant.

13 **ANSWER:**

14 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
15 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
16 without waiving the above general and specific objections, PMI states that Myrick Tantiado was
17 not paid for all accrued and unused vacation days at the time his employment with PMI
18 terminated.

19 **INTERROGATORY NO. 18:**

20 Please state the amount of reimbursable expenses were claimed by Myrick Tantiado at
21 the time of his termination by Defendant.

22 **ANSWER:**

23 PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome,
24 and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and
25 without waiving the above general and specific objections, PMI states that it does not know the
26 amount of reimbursable expenses Myrick Tantiado claimed at the time his employment with
27

PMI terminated. However, in an email from Myrick Tantiado to Rita Esposito dated August 7, 2006, Myrick Tantiado claimed \$4,464.03 in reimbursable expenses.

INTERROGATORY NO. 19:

Please state the amount of reimbursable expenses accrued by Myrick Tantiado remained unreimbursed by Defendant at the time of his termination by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that no reimbursable expenses accrued by Myrick Tantiado remained unreimbursed by PMI at the time his employment with PMI terminated.

INTERROGATORY NO. 20:

Please state all reasons why Defendant did not reimburse all reimbursable expenses accrued by Myrick Tantiado at the time of his termination by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that no reimbursable expenses accrued by Myrick Tantiado remained unreimbursed by PMI at the time his employment with PMI terminated.

INTERROGATORY NO. 21:

Please describe Defendant's commission policy.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce

documents in response to Document Request No. 20 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 22:

Please describe Defendant's policy regarding offsetting commissions upon return of a product.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that any sales commissions paid to its sales representatives are subject to offset if those same products are subsequently returned by customers.

INTERROGATORY NO. 23:

Please identify how Plaintiff was informed of Defendant's commission policy.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that Plaintiff was informed of PMI's commission policy in a letter from Rita Esposito to Myrick Tantiado dated July 1, 2004 offer letter; in a letter from Rita Esposito to Myrick Tantiado dated December 29, 2004; in PMI's 2006 Sales Compensation Plan, a copy of which was distributed to Myrick Tantiado; in a letter from Rita Esposito to Myrick Tantiado dated March 24, 2006; and in a letter from Rita Esposito to Myrick Tantiado dated March 29, 2006.

INTERROGATORY NO. 24:

Please identify how Plaintiff was informed of Defendant's policy regarding offsetting commissions upon return of a product.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver the above general and specific objections, PMI states that Myrick Tantiado was informed of its policy regarding offsetting commissions upon return of a product in a letter from Rita Esposito to Myrick Tantiado dated July 1, 2004 offer letter; in a letter from Rita Esposito to Myrick Tantiado dated December 29, 2004; in PMI's 2006 Sales Compensation Plan, a copy of which was distributed to Myrick Tantiado; in a letter from Rita Esposito to Myrick Tantiado dated March 24, 2006; in a letter from Rita Esposito to Myrick Tantiado dated March 29, 2006; and orally by his manager as well as in training after hire.

INTERROGATORY NO. 25:

Please identify what product was returned to Defendant which created the basis for offsetting Plaintiff's commission at the time of his termination by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that it will produce documents in response to Document Request No. 24 from which information responsive to this interrogatory may be obtained.

INTERROGATORY NO. 26:

Please identify who returned the product to Defendant which created the basis for offsetting Plaintiff's commission at the time of his termination by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that the University of California San Francisco returned the products.

INTERROGATORY NO. 27:

Please identify the reason stated for the return by the person or entity who returned the product to Defendant which created the basis for offsetting Plaintiff's commission at the time of his termination by Defendant.

ANSWER:

PMI objects to this interrogatory because it is vague, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving the above general and specific objections, PMI states that the University of California San Francisco did not give a reason for returning the products the commission for which was offset against Myrick Tantiado's final expense reimbursement. Further answering, PMI states that the University of California San Francisco did not need to give a reason since it first attempted to return the products in February 2006 during the evaluation period for these products.

DATED: October 26, 2007

BARTKO, ZANKEL, TARRANT & MILLER
A Professional Corporation

FOLEY HOAG LLP

By: 

John E. Duke

Attorneys for Defendant

POWER MEDICAL INTERVENTIONS, INC.

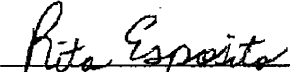
VERIFICATION

I, Rita Esposito, declare as follows:

I presently am Director, Human Resources of Power Medical Interventions, Inc. I have read Defendant Power Medical Interventions Supplemental Answers to Plaintiff's First Set of Interrogatories ("Responses") and, to the best of my knowledge, information, and belief, the Responses are accurate.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 26, 2007, in Langhorne, Pennsylvania.



Rita Esposito

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

--oOo--

MYRICK TANTIADO, an individual,))
))
Plaintiff,))
vs.) Case No. C07-02874
) CRB MED
POWER MEDICAL INTERVENTIONS, a)
Pennsylvania corporation, and)
DOES ONE through FIFTY,)
inclusive,)
))
Defendants.))

CERTIFIED COPY

DEPOSITION OF
MYRICK TANTIADO

April 10, 2008

REPORTED BY: CAROLYN M. MANN, CSR 10066 [#408119]

M E R R I L L L E G A L S O L U T I O N S

CERTIFICATE OF REPORTER

I, CAROLYN M. MANN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition, review of the transcript ☒ was [] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: April 21, 2008.



CAROLYN M. MANN, CSR No. 10066

1 THE WITNESS: I believe that Mr. Chase and I
2 spoke a lot about the issues that we were faced since he
3 was my direct supervisor through most of my employment
4 at PMI. So we have had extensive discussions regarding
5 the issues throughout my employment.

6 MR. DUKE: Q. When you were regional manager
7 did any of the, any of your sales force relay any
8 concerns about PMI's product lines to you?

9 A. Yes, I believe so. To the best of my
10 knowledge, I believe there were, there were discussions.

11 Q. Tell me the substance of those discussions.

12 A. I believe that Victoria Oldridge, who was the
13 East Bay sales rep, had expressed concern selling
14 certain stapler, certain stapling product lines, and we
15 talked about how we could strategize to help her with
16 her concerns and her issues.

17 Q. And so you gave her advice as to how to help
18 her through her concerns and issues; is that correct?

19 A. To the best of my knowledge, I believe so.

20 Q. Do you remember what advice you gave her?

21 A. I believe when I was regional manager I was
22 given advice to myself from other regional managers that
23 I felt needed to be conveyed to my sales force.

24 Q. What was that advice?

25 A. To the best of my knowledge, there were

1 discussions that certain lot numbers that were shipped
2 to hospitals were actually defective, yet -- and
3 although the company knew that these lot numbers were
4 defective, they were sent out anyhow. So we needed to
5 manage, or ensure that the surgeons were not using those
6 lot numbers.

7 Q. Who told you that there were certain lot
8 numbers that were defective?

9 A. To the best of my knowledge, I believe that
10 was shared with, through practically the entire sales
11 force. And Scott Connolly, who was the New York sales
12 rep, had formulated or determined that based on his
13 experience, that the, this was the best protocol to
14 manage defective stapling products so that the surgeons
15 would not get their hands on them.

16 Q. And you testified just a minute ago that the
17 company knew that there were defective lot numbers.
18 What's the basis for your knowledge?

19 A. The basis of my knowledge is because I believe
20 Keith Mintun, who was, who had many different roles
21 within PMI, but he knew exactly what was defective and
22 what was not, and he was Mike Whitman's right-hand man.
23 And furthermore, one of the other regional managers who
24 was based in New York, I believe his name was Ed
25 Wierczbicki, who was the manager for Scott Connolly,

1 expressed deep concern for the product line, and offered
2 a way to help fix the issue. I believe he was
3 terminated when Mike Whitman did not want to, or was not
4 willing to take his advice.

5 Q. Do you know that?

6 A. Based on what was told to me.

7 Q. Were you present at -- I'm sorry. There was
8 the name of the guy who was above Connolly that you just
9 mentioned.

10 A. Ed Wierczbicki. That was told to me.

11 Q. So you weren't present at any of these
12 conversations that you've just discussed.

13 A. No.

14 Q. You just heard about them through the
15 grapevine?

16 A. Correct.

17 Q. Well, let me back up a little bit.

18 A. Heard about what through the grapevine? Can
19 you just, can you . . .

20 Q. Everything you just talked about as far as how
21 the company knew that there were defective lot numbers.

22 A. No, Keith Mintun knew that there were
23 defective lot numbers. I knew because I spoke with him
24 about the defective lot numbers. I did not know
25 firsthand whether Ed Wierczbicki was fired because he,

1 because he expressed concern with the, with the surgical
2 stapling lines; that was hearsay. But Keith Mintun had
3 spoken with me at some point maybe on several occasions
4 with regards to the lot numbers, to the best of my
5 recollection.

6 Q. So you had several conversations with Keith
7 Mintun about lot numbers, defective lot numbers, in
8 which you told Keith Mintun that there were defective
9 lot numbers; is that correct?

10 A. No. To the best of my knowledge, the
11 conversations were more so to ensure that our customers
12 or our surgeons were using the proper lot numbers, not
13 the defective ones. So I think it was triple zero 300,
14 the lot numbers that were triple zero 300 and greater
15 were actually the lot numbers that were fine. So if we
16 had any lot numbers that were triple, that were below
17 triple 0300, then we would make sure that the surgeons
18 did not use those products. So that, there were several
19 conversations to that effect. I don't know the exact
20 conversation, but that was the gist of the conversations
21 that had, that had occurred.

22 Q. Was anything else said in these conversations
23 with Keith Mintun?

24 A. I don't recall other specific things that had,
25 that we had talked about. I believe that Keith at one

1 point had flown up to co-travel with me because he
2 wanted to help win back the California Pacific Medical
3 Center and work with Dr. Lawrence Yee again, and I do
4 remember him stating that or concurring that there are
5 issues or there were issues and that we just have to
6 make sure that he doesn't use the lot numbers that were
7 defective.

8 Q. Do you remember when the first of these
9 conversations with Keith Mintun occurred?

10 A. I don't remember the timeline. I just
11 remember these conversations.

12 Q. Was there a conversation in 2004?

13 A. I don't recall when the conversations took
14 place. I just remember that we had conversations
15 throughout my employment at Power Medical Interventions.

16 Q. When you say throughout your employment, do
17 you mean really truly throughout your employment, or was
18 it more towards the end of your employment, towards the
19 middle?

20 A. I believe it was more -- it, it may have
21 started in the middle of my employment and then
22 progressed toward the late, or toward the tail end of my
23 employment. There's no conversations had occurred when
24 I was recently, when I was hired.

25 Q. In 2005 were there conversations with

1 Mr. Mintun?

2 A. I don't recall what year, whether it was, in
3 fact, 2005, but we did have conversations.

4 Q. Did you ever relay any concerns about any of
5 PMI's product lines to Michael Whitman?

6 A. Never. I --

7 Q. Who was Pat Holmes?

8 MR. MOSLEY: Well, he was in the middle of --
9 you have to let the witness answer the question.

10 MR. DUKE: I did. He answered the question.

11 MR. MOSLEY: He said "and," and then you
12 started your new question.

13 MR. DUKE: Because he answered the question.

14 MR. MOSLEY: You can answer the question.

15 MR. DUKE: No, no.

16 MR. MOSLEY: You can answer the question.

17 MR. DUKE: Excuse me. This is my deposition.

18 MR. MOSLEY: You can't cut him off. I'm not
19 going to let you cut him off or we're ending the
20 deposition now. You've cut him off in mid sentence, and
21 if you do that again, the deposition is over.

22 You get to answer that question.

23 MR. DUKE: No.

24 MR. MOSLEY: If you have more to say, you get
25 to answer it.